Hon. Judge Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHINTAN MEHTA, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF STATE, et al.,

Defendants.

Case No. 2:15-cv-1543-RSM

DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

Noting Date: March 11, 2016

ORAL ARGUMENT REQUESTED

United States Department of Justice, Civil Division
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INTRODUCTION

Plaintiffs challenge Defendants' decision to republish the October 2015 Visa Bulletin ("Revised Bulletin") with six revised dates as violating the Immigration and Nationality Act ("INA"), the Administrative Procedure Act ("APA"), and the Fifth Amendment's Due Process Clause. Plaintiffs seek relief in the form of monetary damages and the reinstatement of the October 2015 Visa Bulletin issued on September 9, 2015 ("Superseded Bulletin"). None of the provisions cited by complaint entitle Plaintiffs to their requested relief. Plaintiffs' claims should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction and under Rule 12(b)(6) for failure to state a viable claim for relief.

First, this Court lacks jurisdiction under the APA to review the Defendants' revisions to the Superseded Bulletin. The revised dates – from the Dates for Filing Visa Applications Chart – do not constitute final agency action because they are subject to revision and do not confer any legally enforceable rights upon issuance. The Court further lacks jurisdiction under the APA to review Defendants' decision to revise these dates as they are based on "reasonable estimates" of when visa numbers may be authorized for issuance, a decision left to Defendants' discretion by the INA. *See* 8 U.S.C. § 1153(g). As explained below, Congress strictly limits the number of visas that may be issued annually, but empowers the Department of State ("DOS") to reasonably determine how closely it must walk the fine line between using all available visa numbers and not exceeding its statutory authority. As a result, there is no standard to apply in assessing the reasonableness of DOS's discretionary determination of how to manage its statutory obligations. Under the Supreme Court's long-established limits on APA review, an "agency is far better equipped than the courts to deal with the many variables involved" with those discretionary decisions "peculiarly within its expertise." *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). Review is therefore precluded under the APA.

Plaintiffs have also failed to plead any legally cognizable claim for relief. Plaintiffs' APA claims, which challenge (1) the sufficiency of DOS's explanation for the revision; (2) DOS's alleged subdelegation of its authority to the Department of Homeland Security ("DHS"); (3) Defendants' interpretation of "immediately available"; and (4) Defendants' maintenance of the

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waitlist for visa numbers, are not supported by factual allegations sufficient to state a violation of the APA's deferential review standard. Rather, the complaint (and the documents referenced therein) demonstrates that DOS sufficiently explained its actions and acted well within its statutory authority in consulting with DHS prior to issuing the Revised Bulletin. Plaintiffs' constitutional claim similarly fails based on Plaintiffs' failure to plead a recognized liberty interest affected by the Revised Bulletin's issuance. The Superseded Bulletin, which was revised ahead of its effective date, did not confer upon Plaintiffs any judicially-enforceable right to have their adjustment applications accepted for filing. Accordingly, Defendants request that the Court grant the Motion to Dismiss.

LEGAL BACKGROUND

Under the INA, certain noncitizens and their derivative family members may obtain lawful permanent resident ("LPR") status, commonly referred to as a "green card," by completing the process known as "adjustment of status." Many such noncitizens initially arrive in the United States under employment-based nonimmigrant classifications. Admission under these nonimmigrant statuses typically begins with an employer petitioning on behalf of the employee seeking to enter the United States through a nonimmigrant visa program, like the H-1B "specialty occupation" visa program, the L "intracompany transferee" visa program, or the O "extraordinary ability" visa program. *See* 8 U.S.C. § 1101(a)(15)(H)(i)(b), (L), & (O). The employer may then commence the process to sponsor the foreign national for LPR status. For an individual in the United States seeking LPR status based on an employment-based immigrant petition (like those in the putative class), this process typically involves three steps.

First, the employer generally must file an application for a labor certification with the Department of Labor ("DOL").[1] *See* 8 U.S.C. § 1182(a)(5)(A). By approving the labor

[1] In certain situations, an alien may be able to self-petition within the employment-based category, in which case a labor certification would not be required. *See* 8 U.S.C. §§ 1153(b)(1) & (2)(B), 1154(b), 1182(a)(5)(D); 8 C.F.R. §§ 204.5(h)(5), (i)(3)(iii), (j)(5), (k)(4)(ii). In those situations, the priority date would be the date he or she properly files the I-140 petition with USCIS.

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certification, DOL is certifying that: (1) there are insufficient U.S. workers able, willing, qualified, and available for the particular job; and (2) employment of the individual will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 U.S.C. § 1182(a)(5)(A)(i). The approved labor certification establishes, among other things, the wage that the employer must pay the worker. *See* 8 U.S.C. § 1182(p); 20 C.F.R. § 656.40. The date DOL accepts the application serves as the employee's "priority date," which functions as the employee's place in line for an immigrant visa number. 8 C.F.R. § 204.5(d).

Second, once DOL issues the labor certification, or if a labor certification is not required, the employer may file a Petition for Alien Worker (Form I-140 petition) with U.S. Citizenship and Immigration Services ("USCIS") on behalf of the employee. 8 U.S.C. § 1154(a)(1)(F), (b); 8 C.F.R. §§ 204.5(c), 204.5(h)(1), (i)(1), (j)(1), (k)(1) & (4), (l)(1). In the Form I-140 petition, the employer requests that the employee be classified under one of the employment-based immigrant visa preference categories based on the employee's skills, experience, and/or education. 8 U.S.C. § 1153(b). USCIS's approval of the Form I-140 petition does not constitute a determination that the individual is eligible for an immigrant visa or adjustment of status to that of an LPR; it is merely a finding that the individual meets the requirements of the particular employment-based immigrant visa classification sought.

Finally, to apply for adjustment of status under section 245(a) of the INA, the individual must wait until an immigrant visa number is "immediately available" before filing an application for adjustment of status (Form I-485 application) with USCIS. 8 U.S.C. § 1255(a)(3), (c); 8 C.F.R. §§ 204.5(d), 245.1(a), (b), (g). The INA generally caps the annual number of employment-based immigrant visas at 140,000, of which 40,040 generally are available to individuals applying under the employment-based second preference (EB-2) classification. 8 U.S.C. §§ 1151(d), 1153(b). These caps represent the total number of aliens who either may be issued an immigrant visa number or approved for adjustment of status based on an approved Form I-140 petition in each fiscal year. *Id.* The INA further limits the number of employment-based immigrant visa numbers that generally may go to nationals of any one country during a fiscal year to 7% (known as the "per-country limitation"). 8 U.S.C. § 1152(a)(2). As a result of

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the statutory caps and per-country limitation, individuals from certain countries with high numbers of workers seeking to immigrate (*e.g.*, India, China, and the Philippines) may have to wait years for a visa number to become available to them.

In allocating immigrant visa numbers, the INA directs that they be issued to eligible immigrants in the order in which petitions were filed. 8 U.S.C. § 1153(e)(1). That order is set by the priority date assigned to each applicant, which as noted above (for most individuals seeking employment-based classification) is the date DOL receives the application for a labor certification from the employer. If no labor certification is required, the priority date is the date USCIS accepts the Form I-140 petition for filing. Applicants refer to the monthly Visa Bulletin issued by DOS to determine whether a visa number is available to them so they may be eligible to submit their Form I-485 applications to USCIS.

FACTUAL BACKGROUND

Prior to the October 2015 Visa Bulletin, the monthly Visa Bulletin contained only one chart of priority dates for each visa category, the "cut-off date," which represented DOS's calculation for visa number availability (*i.e.*, which individuals were eligible to be issued visas or granted adjustment of status that month). *See* ECF No. 22-1 at ¶ 75. Pursuant to DHS regulations, USCIS adopted the cut-off dates to determine when a visa number could be deemed "immediately available" for the purpose of accepting applications for adjustment of status. 8 C.F.R. § 245.1(g).

In September 2015, as part of the President's efforts to modernize the immigrant visa system, Defendants announced that the Visa Bulletin would be updated to include two charts: (1) the Application Final Action Dates Chart ("Final Action Chart"), which represents when a visa number may be available such that a visa could be authorized for issuance; and (2) the Dates for Filing Visa Applications Chart ("Filing Chart"), which represents "the earliest dates when applicants may be able to apply." ECF No. 22-4. Consistent with this announcement, on September 9, 2015, DOS published the Superseded Bulletin for October 2015 and included both the Final Action Chart and Filing Chart for each visa classification. ECF No. 22-7. The Superseded Bulletin was published on the DOS Visa Bulletin website as an "Upcoming Visa

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Bulletin," as, at the time, the September Bulletin was published as the "Current Visa Bulletin."

After consultations with DHS, DOS published a Revised Bulletin for October 2015 on September 25, 2015, in which six dates in the Filing Chart were retrogressed. ECF No. 22-7. This Revised Bulletin was published prior to its October 1 effective date and prior to it being published as the "Current Visa Bulletin." These dates involved the following six categories: Mexico Family-Sponsored First Preference, Mexico Family-Sponsored Third Preference, China Employment-Based Second Preference, India Employment-Based Second Preference, Philippines Employment-Based Third Preference, and Philippines Other Workers. *Id*. DOS offered the following statement regarding the change:

> This bulletin supersedes the bulletin for October 2015 that was originally published on September 9, 2015, and contained Dates for Filing Applications long used by the Department of State for internal processing purposes. Following consultations with the Department of Homeland Security (DHS), the Dates for Filing Applications for some categories in the Family-Sponsored and Employment-Based preferences have been adjusted to better reflect a timeframe justifying immediate action in the application process.

Id.; ECF No. 22-7 at 2.

USCIS is currently accepting adjustment of status applications consistent with the February Visa Bulletin. Unlike the Superseded and Revised Bulletins, beginning with the December 2015 Visa Bulletin, DOS does not indicate whether the Filing Chart may be used to file in the Visa Bulletin, but instead refers the applicant to the USCIS website for that information. *See* http://travel.state.gov/content/dam/visas/Bulletins/visabulletin_february2016.pdf (last visited Feb. 9, 2015). The USCIS website contains the following instruction:

> If USCIS determines that there are more immigrant visas available for a fiscal year than there are known applicants for such visas, we will state on this page that you may use the ***Dates for Filing Visa Applications*** chart. Otherwise, we will indicate on this page that you must use the ***Application Final Action Dates*** chart to determine when you may file your adjustment of status application.

www.uscis.gov/visabulletininfo (last visited Feb. 9, 2016) (emphasis in original).

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LEGAL STANDARD

Defendants seek dismissal of the Second Amended Complaint under Federal Rule of Civil Procedure 12(b)(1), for lack of jurisdiction, and pursuant to Rule 12(b)(6), for failure to state a claim for relief. Under Federal Rule of Civil Procedure 12(b)(1), a defendant may challenge the plaintiff's jurisdictional allegations in one of two ways: (1) a "facial" attack that accepts the truth of the plaintiff's allegations but asserts that they are insufficient on their face to invoke federal jurisdiction, or (2) a "factual" attack that contests the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings. *Leite v. Crane Co.*, 749 F.3d 1117, 1121-22 (9th Cir. 2014); *see also Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); Fed. R. Civ. P. 12(b)(1).

When a party raises a facial attack, the court resolves the motion as it would under Rule 12(b)(6), accepting all reasonable inferences in the plaintiff's favor and determining whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction. *Id.* at 1122. When a party raises a factual attack, the court applies the same evidentiary standard as it would in the context of a motion for summary judgment. *Id.* Summary judgment is appropriate if the evidence, when viewed in the light most favorable to the non-moving party, demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A complaint may also be dismissed under Rule 12(b)(6) if it fails to allege a cognizable legal theory or fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ARGUMENT

I. The Court lacks jurisdiction over Plaintiffs' APA Claims.

Under the APA, agency action is subject to judicial review only when it is made reviewable by statute or a "final" action "for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *see also Cabaccang v. U.S. Citizenship & Immigration Servs.*, 627 F.3d 1313,

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1315 (9th Cir. 2010). The APA does not permit review where "statutes preclude judicial review" and "where the agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1),(2). Here, the Court lacks jurisdiction over Plaintiffs' APA claims for two reasons. First, the Filing Chart does not constitute a final agency action. Second, DOS's methodology for developing its "reasonable estimates" and DHS's determination regarding whether a visa number is immediately available to particular applicants are committed to agency discretion by the INA.

A. Plaintiffs do not challenge a final agency action.

Plaintiffs' claims challenging the Filing Charts are not subject to judicial review under 5 U.S.C. § 701(a)(1) because the Filing Charts do not constitute final agency action. Since October 2015, the Visa Bulletin indicates that applicants may use the Filing Chart "when USCIS determines that there are more immigrant visas available for the fiscal year than there are known applicants for such visas." *See* ECF Nos. 22-3; 22-7; www.uscis.gov/visabulletininfo (last visited Feb. 9, 2016). The Revised Bulletin, like the Superseded Bulletin, noted which chart would be used by USCIS by stating that "USCIS has determined that this chart may be used (in lieu of the [Application Final Action Dates] chart in paragraph 4.A.) this month for filing applications for adjustment of status with USCIS." ECF Nos. 22-3; 22-7 (emphasis in original). The November, December, January, February, and March Bulletins simply refer applicants to USCIS's website for information regarding which chart may be used for filing adjustment of status applications. *See* www.uscis.gov/visabulletininfo (last visited Feb. 8, 2016).

An agency action is considered final if two elements are met. First, the action must "mark the 'consummation' of the agency's decisionmaking process" and, thus, cannot be tentative or interlocutory. Second, "the action must be one by which 'rights or obligations have been determined,'" or from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). "The imposition of an obligation or the fixing of a legal relationship is the indicium of finality in the administrative process." *Cabaccang v. U.S. Citizenship & Immigration Servs.*, 627 F.3d at 1316; *Mount Adams Veneer Co. v. United States*, 896 F.2d 339, 343 (9th Cir. 1990). "Indicia of finality include: the administrative action challenged should be a definitive statement of an agency's position; the action should have a direct and immediate effect on the

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day-to-day business of the complaining parties; the action should have the status of law; immediate compliance with the terms should be expected; and the question should be a legal one." *Mt. Adams Veneer Co.*, 896 F.2d at 343 (citing *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-40 (1980)). Virtually all of these indicia are lacking here.

First, the Filing Charts do not reflect an "unalterable" decision. *Nat'l Treasury Employees Union v. Fed. Labor Relations Authority*, 712 F.2d 669, 675 (D.C. Cir. 1983). To the contrary, they are subject to revision at any time to ensure that the agencies remain in compliance with the statutory limits. *See id.* at 671 (Agency order lacks finality while it remains subject to "revision"); *see also Bennett*, 520 U.S. 177-78 (Final agency action marks the "consummation" of a decision-making process). Even in months where a revised Bulletin is not issued, DOS may choose to retrogress cut-off dates based on available visa numbers and therefore amend the pool of individuals eligible to file their adjustment of status applications. The first page of the Superseded Bulletin makes this concept plain:

> If it becomes necessary during the monthly allocation process to retrogress a cutoff date, supplemental requests for numbers will be honored only if the priority date falls within the new cut-off date announced in this bulletin. If at any time an annual limit were reached, it would be necessary to immediately make the preference category "unavailable", and no further requests for numbers would be honored.

ECF No. 22-3; *see also* ECF No. 22-7; http://travel.state.gov/content/visas/en/law-and-policy/bulletin/2015/visa-bulletin-for-march-2015.html (last visited Feb. 12, 2016). Accordingly, the publication of the Filing Chart does not mark an unalterable decision that adjustment of status applications will be accepted for filing.

Second, no "legal consequences" flow from the publication of the Filing Charts. Even after the chart's effective date, USCIS retains discretion to adjudicate both the petition and any request for ancillary benefits. The charts, therefore, do not have "the status of law" and do not themselves confer any right upon an individual to have an adjustment of status application accepted for filing. Rather, it is USCIS's acceptance of a particular adjustment of status application that determines Plaintiffs' eligibility to apply for the ancillary benefits sought here (*e.g.*, work authorization, authorization relating to foreign travel). Those benefits, however, must

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also be separately applied for and adjudicated. Thus, the publication of the charts is not an action from which "legal consequences will flow."

Finally, even if the Court finds that the Filing Charts can, in some instances, constitute a final agency action, the Court should find that the challenged Filing Charts from the Revised Bulletin are no longer a final agency action. In the time since the complaint was filed, DOS has issued newer Filing Charts (in the November, December, January, February, and March Visa Bulletins) and Defendants have updated their process for notifying applicants as to which chart to follow in submitting their adjustment of status applications. To the extent Plaintiffs' APA claims challenge the Revised Bulletin, and not the current Filing charts, the APA does not permit review. Plaintiffs, therefore, have failed to state a claim under 5 U.S.C. § 706(2) for review of the Revised Bulletin.

B. DOS's "reasonable estimates" are not subject to judicial review.

Plaintiffs' claims challenging the Filing Charts are also exempted from judicial review under 5 U.S.C. § 701(a)(2). Section 1153(g) is drawn in such broad terms that there is no law to apply. *Heckler*, 470 U.S. at 829-30; *See Webster v. Doe*, 486 U.S. 592, 599 (1988). In that provision, Congress simply said that DOS estimates on anticipated number of visas to be issued (on which DHS relies for determining visa availability) were to be "reasonable" without providing any standard as to whether a particular estimate was "reasonable enough." *See* 8 U.S.C. § 1153(g). It is true that DOS has, in the interest of transparency, disclosed to the public factors that it relies on in making its estimates, but there is no standard to review *how* the agency balances or weighs these factors in making its estimates. *Heckler*, 470 U.S. at 829-30. To illustrate, the congressionally-imposed caps on how many visas may be issued per year (specified by nationality and preference category) can be thought of as "cliffs" that Defendants cannot go beyond. *See* 8 U.S.C. §§ 1151(a)(2), 1152(a)(2). But there is no meaningful standard for how close to the edge of the cliff DOS should stand, *i.e.*, what should be its tolerance for risk of accidentally exceeding the congressional limits on immigrant visa issuances. *See* 8 U.S.C. § 1153(g). In the absence of any meaningful standard by which to base a decision, judicial review would amount to nothing more than a court substituting its policy preference for the judgment of

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the executive. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64, 66-67 (2004) (holding that the APA could not be used by courts to interfere with how the agency "works out compliance with the broad statutory mandate" because it would "inject[] the judge into day-to-day agency management"). Courts are not permitted to substitute their judgment for that of the agency under the APA. *See Motor Vehicle Ass'n v. State Farm Ins.*, 463 U.S. 29, 41 (1983). Accordingly, Plaintiffs' APA claims should be dismissed for lack of jurisdiction.

II. Plaintiffs' APA claims fail as a matter of law (Counts I-II; IV-VII).

Plaintiffs' appear to raise three categories of APA claims in the amended complaint: (1) claims related to DOS's decision to rescind and reissue the October Bulletin prior to its effective date (Count I); (2) claims related to DOS' alleged "subdelegation" of authority to DHS (Count II); (3) claims challenging Defendants' interpretation of "immediately available" (Count IV-V); and (4) claims related to Defendants' maintenance of a priority date waitlist (Count VI-VII). None of these claims raise cognizable claims under the APA.

A. DOS adequately explained its reason for issuing the Revised Bulletin.

In Count I, Plaintiffs allege that Defendants acted arbitrarily and capriciously by failing to explain "its departure from its practice of issuing a single, definitive Visa Bulletin each month." ECF No. 7 at 5. This claim fails as a matter of law. Defendants explained that the Revised Bulletin was issued based on Defendants' determination that some of the Filing Chart dates in the Superseded Bulletin did not accurately reflect visa number availability as required for USCIS to accept adjustment of status applications. *See* ECF No. 22-7 ("Dates for Filing Applications for some categories . . . have been adjusted to better reflect a timeframe justifying immediate action in the application process.").

No further explanation is required by the APA. Courts should uphold a "decision [of] less than ideal clarity . . . if the agency's path may reasonably be discerned." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004); *see also Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). The question is whether the agency's decision is "within the bounds of reasoned decisionmaking." *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983). Here, the revisions were simply to bring the dates in line with estimates of how

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many visa numbers are available during the year. As such, it was sufficient for DOS to simply explain that the Revised Bulletin updated six priority-dates contained in the Superseded Bulletin. Second, Plaintiffs' arguments suggest that individual reliance on an agency's published statement, which was revised prior to its effective date, may form the basis for an APA claim. However, USCIS is not authorized to consider individual reliance in determining whether it has the statutory authority to accept adjustment applications. That determination is limited strictly to DOS's assessment regarding whether a visa may be authorized for issuance based on estimated demand within the constraints imposed by the statutory caps. 8 C.F.R. § 245.1(g) (immediate availability for adjustment applications is determined by consulting the Visa Bulletin); *see also* 8 U.S.C. § 1153(g); 8 U.S.C. §§ 1151 (worldwide limit), 1152 (per-country limit). Accordingly, Count I should be dismissed as failing to plead a legally cognizable violation of the APA. *See* Fed. R. Civ. P. 12(b)(6).

B. Plaintiffs have not alleged facts sufficient to support the subdelegation claim.

In Count II, Plaintiffs allege that the Revised Bulletin constitutes an unlawful subdelegation by DOS to DHS.[2] Plaintiffs support their claim based on speculation born out of DOS's acknowledgement that the Revised Bulletin was issued following consultation with DHS. This fact is insufficient to plead a subdelegation claim. The INA explicitly requires DOS and DHS to share information as part of the Visa Bulletin process. 8 U.S.C. §§ 1153(e)(1), 1255(b) (DOS must reduce by one the number of authorized preference visas when DHS approves an adjustment of status application). The regulations similarly recognize the need for communication between the agencies. *See, e.g.*, 22 C.F.R. 42.51. Indeed, the Ninth Circuit has, in the past, criticized DOS and DHS for failing to properly exchange information during the visa allocation process. *See Zixiang Li v. Kerry*, 710 F.3d 995, 1005 (9th Cir. 2013) (Reinhardt, J.,

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[2] Plaintiffs baselessly allege that the revisions were the result of "improper influence of individuals in the legislative branch." ECF No. 22-1 at ¶ 108. This allegation, however, does not support a claim of unlawful subdelegation to another agency and fails to show that the agency acted in an improper manner. This court does not need to resolve unsupported allegations of Defendants' motive where the agency action is unreviewable or does not support an APA claim.

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concurring). Thus, it is important that DHS communicate with DOS in order for Defendants to comply with their statutory obligations. *Id*. at 1005-06. This cooperative process is contemplated by statute, *id*. at 1006, and, therefore, not sufficient to state a subdelegation claim.

The complaint demonstrates that the Revised Bulletin was issued following a lawful consultation between the two agencies and not as the result of a subdelegation of authority from DOS to DHS. Plaintiffs do not dispute that the Revised Bulletin was issued by DOS, not by DHS, on DOS letterhead, and was posted to DOS's website. ECF No. 22-7. The Revised Bulletin sets forth DOS's process for determining dates and in no way indicates that DOS assigned DHS any improper role in estimating visa issuance for purposes of publishing dates in the Visa Bulletin charts. Thus, the complaint and referenced documents demonstrate that DHS and DOS cooperated in the very manner contemplated by statute. Plaintiffs' subdelegation claim should therefore be dismissed.

C. Plaintiffs "immediately available" claims are insufficient to plead a violation of the APA.

In Counts IV and V, Plaintiffs allege that Defendants adopted an arbitrary and capricious[3] definition of the term "immediately available" in determining the priority dates eligible for filing an application to adjust status. These claims fail for two reasons.

First, Plaintiffs have not pled any support for its claim that Defendants are acting in violation of the INA by interpreting "immediately available" to include visa numbers estimated to become available during the fiscal year. When the challenged agency action involves an interpretation of statutory language" the question is "whether an agency interpretation [of a statute or regulation] is 'arbitrary and capricious in substance.'" *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011) (quoting *Mayo Found. v. United States*, 131 S. Ct. 704, 711 (2011)). The

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[3] Count IV does not appear to raise an APA claim, but instead relies exclusively on 8 U.S.C. § 1255. Section 1255, however, does not itself create a cause of action. *Cf. Nieto-Santos v. Fletcher Farms*, 743 F.2d 638,641 (9th Cir. 1984) (finding no implied cause of action in INA for H-2B workers and noting there is "nothing in the underlying purposes of the legislative scheme suggesting that it would be appropriate to imply a privately enforceable remedy for alien workers"). Even if (very generously) construed as a claim under 5 U.S.C. § 706(2), Plaintiffs' allegations are insufficient.

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complaint does not contain any allegations supporting such a claim. Rather, Plaintiffs' own allegation that the INA "does not provide relevant guidance for calculating the number of available visa numbers" directly contradicts their assertion that Defendants have violated an express statutory mandate. ECF No. 22-1 at ¶ 169. Plaintiffs have not offered any meaningful explanation of why Defendants' interpretation of "immediately available" is incorrect – much that it is arbitrary or capricious – and, therefore, fail at a pleading level to show that Defendants' interpretation violates the APA. Plaintiffs' unsupported and non-specific disagreement with Defendants' reading of the statute is not enough to satisfy Rule 12, especially where Plaintiffs have not attempted to proffer an alternative interpretation. *Id.*

Second, Plaintiffs have not alleged its interpretation of the phrase would remedy Plaintiffs' asserted injury and, therefore, do not have standing to assert Counts IV and V. At its "irreducible constitutional minimum," the doctrine requires satisfaction of three elements: (1) a concrete and particularized injury-in-fact, either actual or imminent, (2) a causal connection between the injury and defendant's challenged conduct, and (3) a likelihood that the injury suffered will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Although courts may infer the causal link between a procedural APA violation and the alleged injury, where a plaintiff alleges a substantive defect, the plaintiff must show some connection between the defect challenged and the harm allegedly suffered. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496-97 (2009). Here, Plaintiffs have not asserted any alternative meaning of immediately available or shown that the Plaintiffs would be eligible to file under that interpretation. Therefore, Plaintiffs have not satisfied their constitutional burden of showing standing to challenge the Defendants' actions.

D. Plaintiffs' waitlist claims should be dismissed.

In Counts VI and VII, Plaintiffs appear to challenge the procedures employed by Defendants in maintaining the waiting lists used to determine which priority dates are eligible to adjust status. Plaintiffs have not alleged any specific inaccuracy in the waitlist, but cryptically allege that "Defendants acted in violation of the statute by allocating immigrant visa numbers to individuals other than [P]laintiffs and class members even though under the statute Plaintiffs and

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class members were entitled to receive immigrant numbers." ECF No. 22-1 at ¶ 172. It is entirely unclear from the face of the complaint what statutory, regulatory, or other duty Plaintiffs allege Defendants violated or which individuals were improperly placed ahead of Plaintiffs on the priority lists. Accordingly, Plaintiffs have not alleged any final action that falls below the 5 U.S.C. § 706(2) standard. Without such an allegation, Plaintiffs also have failed to demonstrate that Plaintiffs were injured by Defendants' waitlist procedures, and that Plaintiffs' injuries are capable of redress through different waitlist procedures. *Lujan*, 504 U.S. at 560. Therefore, Plaintiffs' allegations are insufficient to plead Article III standing or a cognizable APA claim.

Even if Plaintiffs had included more than conclusory allegations, the claims fail under binding circuit precedent. In *Zixiang Li*, 710 F.3d at 1001, the Ninth Circuit dismissed similar claims under Rule 12(b)(6) due to Plaintiffs' failure to plead a specific statutory requirement with which USCIS was failing to comply by declining to maintain "an elaborate system for monitoring priority dates or the number of pending applications." *Id*. The *Zixiang Li* court expressly declined to find USCIS could act arbitrarily or capriciously "by failing to create a system, or complying with vague standards not required by law." *Id*. Similarly, here the Court "cannot impose procedural requirements" simply because Plaintiffs believe its recommended procedures "are best or most likely to achieve the public good." *Id*. (quoting *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008)).

III. The Superseded Bulletin did not create a liberty interest and does not entitle Plaintiffs to additional process (Count III).

For a government benefit to implicate a property interest "a person clearly must have more than an abstract need or desire for it," "more than a unilateral expectation of it," but "must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). Plaintiffs claim that the Superseded Visa Bulletin conferred a liberty interest in allowing Plaintiffs to file their adjustment of status applications with USCIS on October 1, 2015, and assert that they were entitled to additional notice of DOS's intention to rescind the Bulletin. ECF No. 22-1 at ¶ 165. Plaintiffs have not established a legitimate claim or right to apply for adjustment of status on October 1, 2015, or demonstrated an entitlement to

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additional notice prior to rescission. Accordingly, the claim should be dismissed under Rule 12(b)(6).

As an initial matter, there is no right – statutory or otherwise – to file an application for adjustment of status prior to a visa number being "immediately available" as the INA requires visa-number availability as a pre-condition for filing an adjustment application. 8 U.S.C. § 1255(a)(3), (c); 8 C.F.R. §§ 204.5(d), 245.1(a), (g). There is likewise no right to discretionary immigration benefits that Plaintiffs may seek upon filing their adjustment of status applications. *See, e.g.*, *Assaad v. Ashcroft*, 378 F.3d 471, 475 (5th Cir. 2004) (stating, in a removal context, that due process claims revolving around an alleged failure to receive discretionary relief are not based upon a constitutionally protected liberty interest). Plaintiffs' reliance on *Haitian Refugee Center v. Nelson*, 872 F.2d 1555, 1562 (11th Cir. 1989), and *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 553 (9th Cir. 1990), is misplaced. ECF No. 22-1 at ¶ 163. Both cases discuss an alleged right to file that were entirely based in statute. Here, because the INA specifically denies Plaintiffs eligibility for adjustment of status unless a visa is "immediately available" to the applicant at the time the adjustment of status application is filed, 8 U.S.C. § 1255(a)(3), both cases are inapt. Neither case suggests the existence of a freestanding right not otherwise contemplated by the underlying statutory scheme.

Plaintiffs premise their asserted constitutional entitlement on the agency's practice of issuing Upcoming Visa Bulletins during the month prior to their effective date. ECF No. 22-1 at ¶ 164. There are at least four problems with Plaintiffs' contention. First, DOS did not have any prior practice of releasing the second set of dates, the dates in the Filing Charts, and therefore there is no historical basis for relying on the release of those dates. As discussed above, in all prior bulletins, DOS published only one set of dates, now included in the Final Action charts, which represent dates for those to whom visas numbers may be issued. Thus, from a historical perspective, Plaintiffs had no entitlement to file their applications at any time prior to the date on which their priority date authorized visa number issuance to them under the Final Action chart. Indeed, the only dates that have been historically available to applicants were not changed in the Revised Bulletin. Accordingly, historical practice cannot support Plaintiffs' asserted right.

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Relatedly, Plaintiffs cannot show that their reliance was more than a "unilateral expectation." *Roth*, 408 U.S. at 577. Prior to September 9, 2015, Plaintiffs had no reasonable expectation that they would be able to file their adjustment of status applications in the foreseeable future. Under the Visa Bulletin for September 2015 (issued on August 11, 2015), the priority date for Indian and Chinese Nationals in the EB-2 category was January 1, 2006, more than three years earlier than the priority dates held by any of the putative class. Therefore, prior to September 9, 2015, Plaintiffs were not expecting to be able to apply for adjustment of status in the foreseeable future. Although the Revised Bulletin does not afford Plaintiffs the opportunity to apply for adjustment of status on October 1, 2015, it in no way deprives them of their right to file when a visa number becomes immediately available in accordance with the INA.

Third, the issuance of the Visa Bulletin prior to its effective date is not required by statute and is merely a courtesy to applicants. For this reason, Plaintiffs' reference to a "preparation period" and "application period" is misleading. ECF No. 22-1 at ¶ 57. Neither the INA nor the regulations contemplate providing applicants with a set period to prepare their applications, perhaps in part because applications are not *due* on the first of the month; the application period merely *opens* on the first of the month. Therefore, even if the Visa Bulletin itself could confer a liberty interest, that liberty interest could not be triggered until after the Bulletin's effective date. There is no basis in statute or regulation to find a liberty interest that attaches concurrently with the issuance of the Visa Bulletin, particularly prior to its effective date.

Finally, even if the Superseded Bulletin could create some abstract liberty interest, Plaintiffs have not shown their interest to be so weighty as to require any additional process. Here, DOS publicly identified a problem with the Superseded Bulletin and published the Revised Bulletin in advance of the effective date. Plaintiffs have not alleged any legal basis for their assertion that their limited interest in a "preparation period" is sufficient to entitle them to file under the Superseded Bulletin. This is especially true here given that the asserted entitlement (to file an application for adjustment of status) risks violating the INA by offering benefits well ahead of immediate visa number availability. Thus, Plaintiffs appear to claim that an agency's improper assertions of authority can somehow grant the agency power it otherwise lacked. There

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is no basis for this assertion. To the extent Plaintiffs have a limited interest in a preparation period, that interest is insufficient to entitle them to file their adjustment of status applications under the Superseded Bulletin. Notice of the Revised Bulletin issued in advance of the Bulletin's effective date is more than sufficient to satisfy the requirements for due process. Accordingly, Plaintiffs' constitutional claim fails as a matter of law and must be dismissed.

IV. The Court should strike the requested relief as not supported by the APA.

A. The Court lacks authority to reinstatement the Superseded Bulletin.

In the unlikely event the Court finds the Superseded Bulletin was issued in violation of the APA, the remedy for that violation is to remand the issue to the agency to address the error; it is not an order requiring Defendants to accept Plaintiffs' adjustment of status applications under an invalid Visa Bulletin. "Under settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the correct legal standards." *PPG Industries, Inc. v. United States*, 52 F.3d 363 (D.C. Cir. 1995); *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 657-58 (2007) ("[I]f the EPA's action was arbitrary and capricious, as the Ninth Circuit held, the proper course would have been to remand to the Agency for clarification of its reasons."); *Delgado v. Holder*, 648 F.3d 1095, 1103, n.12 (9th Cir. 2011) ("[I]f an agency erroneously contends that Congress' intent has been clearly expressed and has rested on that ground, we remand to require the agency to consider the question afresh in light of the ambiguity we see.") (citing *Negusie v. Holder*, 555 U.S. 511, 523 (2009)). Section 705 of the APA "does not confer jurisdiction onto the Court to alter the status quo nor does it allow the Court in issuing interim relief to actually dictate specific terms or conditions to a governmental agency." *Salt Pond Associates v. U.S. Army Corps of Engineers*, 815 F. Supp. 766, 775-76 (D. Del. 1993); *accord Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 21 (1952) (the power "'to affirm, modify, or set aside' [agency action] 'in whole or in part'. . . . is not power to exercise an essentially administrative function") (quoting 5 U.S.C. § 706)). Therefore, at best, a successful APA claim entitles Plaintiffs to an order remanding the issue to the agency for further explanation of its actions. *Fla. Power & Light Co. v. Lorion*, 470

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U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation."). The APA does not permit the relief requested in the complaint.

Even where the APA permits the Court to cabin the agency's discretion on remand, the Court does not have the authority to require the agency to act in a manner that exceeds its statutory authority. A federal court cannot properly order an agency to violate a law. *See INS v. Pangilinan*, 486 U.S. 875, 883 (1988) (explaining that a court of equity cannot create an equitable remedy in violation of law); *Zixiang Li*, 710 F.3d at 1001 (court cannot require agencies to adopt certain process for monitoring visa availability or require agencies to issue visas in violation of statutory limitations); *Iddir v. I.N.S.*, 301 F.3d 492 (7th Cir. 2002) (affirming dismissal of claim seeking to compel agency to adjudicate applications even though it lacked statutory authority to do so). As a result, Plaintiffs cannot link their APA claims to their requested relief.

B. Plaintiffs' request for monetary damages should be struck.

Sovereign immunity shields the federal government and its agencies from suit, absent a Congressional waiver. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994). In order for waivers of the government's sovereign immunity to be effective, they must be "unequivocally expressed" by Congress. *Lehman v. Nakshian*, 453 U.S. 156, 160–61 (1981). Plaintiffs assert entitlement to reliance damages based on their claims brought under the INA and APA. Neither the INA nor APA, however, contain express waivers of the government's sovereign immunity for monetary damages. 5 U.S.C. § 702; *See E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070, 1086 (9th Cir. 2010). As discussed above, the INA provisions cited by Plaintiffs do not create an independent cause of action. *See infra* note 3. The APA only permits an action seeking relief other than monetary damages, and therefore does not contain a waiver of sovereign immunity for claims for money damages. 5 U.S.C. § 702; *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir.1989) (holding that the APA "waives sovereign immunity in all actions seeking relief from official misconduct except for money damages"). Therefore, Plaintiffs request for money damages should be dismissed.

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CONCLUSION

For the foregoing reasons, the Court should dismiss the Second Amended Complaint.

Dated: February 12, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 12, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically filed Notices of Electronic Filing.

/s/ Sarah Wilson
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